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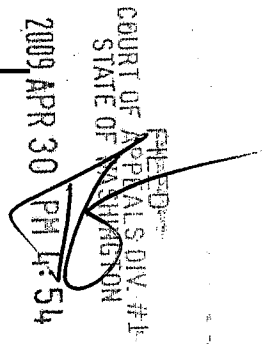
No. 62074-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE



STATE OF WASHINGTON,

Respondent,

v.

DAVID A. OPPELT, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SWNOHOMISH COUNTY

The Honorable Ellen J. Fair
The Honorable Bruce I. Weiss

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prejudicial and unjustified pre-accusatorial delay of six years and eleven months during which time the case "fell through the cracks" violated Mr. Oppelt's constitutional right to due process.

2. The prejudicial and unjustified pre-accusatorial delay of six years and eleven months due to governmental misconduct materially affected Mr. Oppelt's right to a fair trial.

3. Based on its finding the pre-accusatorial delay actually prejudiced Mr. Oppelt and was caused by the State's unjustified negligence, the court erred in balancing the State's interest against Mr. Oppelt's prejudice.

4. When balancing the actual prejudice to Mr. Oppelt and the State's interest in prosecuting the case, the trial court erred in speculating that the pre-accusatorial delay was prejudicial to the State's ability to proceed with the charges.

5. Based on its finding the pre-accusatorial delay actually prejudiced Mr. Oppelt and was caused by the State's unjustified negligence, the trial court erred in entering Conclusion of Law 6:

> The court then moves to the third prong of the test, which is the Balancing [sic] of the State's interests in prosecution against the prejudice shown to the

> defendant. In this case the court finds that the State's interests outweigh the prejudice shown to the defendant for the following reasons: the loss of Bertha Olson's memory, the issue with the lotion, and the delay in prosecution will likely weigh against the State's interests more than the defendant's interests; the defense will still be able to argue that the lotion applied may have caused the redness on the victim's genitalia, the issue about Floyd can be reconciled by other witnesses, the loss of the field notes is unlikely to have actually prejudiced the defendant, the State will have much more of a challenge in proving this case due to the passage of time.

6. To the extent it could be considered a Finding of Fact, in the absence of substantial evidence in the record, the trial court erred in entering Conclusion of Law 7.

> Based on the above, the defendant has not met his burden of proving that he cannot receive a fair trial. The prejudice shown is just as likely to make it more difficult for the State to prove its case and is outweighed by the State's interest in prosecuting the defendant.

7. To the extent it could be considered a Finding of Fact, in the absence of substantial evidence in the record, the trial court erred in entering Conclusion of Law 8:

> Therefore, the defendant's motion to dismiss under the Due Process clause, the Washington State Constitution, and CrR 8.3(b) is denied.

8. The trial court erroneously prohibited Mr. Oppelt from possessing or accessing pornographic materials, as a condition of community custody.

9. The trial court erroneously prohibited Mr. Oppelt from associating with known users or sellers of illegal drugs, as a condition of community custody.

10. The trial court erroneously prohibited Mr. Oppelt from possessing drug paraphernalia, as a condition of community custody.

11. The trial court erroneously ordered Mr. Oppelt to stay out of drug areas, as a condition of community custody.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When determining whether a delay violated a defendant's due process rights, courts utilize a three-step test: (1) the defendant must establish actual prejudice; (2) the State must give reasons for the delay; and (3) if the State is able to justify the delay, the court balances the State's interests and the prejudice to the accused. The court reaches the third step only if it finds actual prejudice and justifiable delay. Here, where the case unjustifiably "fell through the cracks," did the trial court err in balancing the

State's interests and the prejudice to Mr. Oppelt? (Assignments of Error 1, 3, 5, 7)

2. The trial court found the State had the following interests in prosecution: "the administration of justice, accountability, protecting society, the victim and other children from serious offenses like those in this case." When balancing the State's interests and the actual prejudice to Mr. Oppelt, did the court err in considering speculative prejudice to the State? (Assignments of Error 4, 5, 7)

3. The State has no interest in prosecuting an accused in an unjustifiably negligent fashion. Did the trial court err in concluding the State's interests outweighed the prejudice to Mr. Oppelt where the State had no justification for the pre-accusatorial delay of six years and eleven months? (Assignments of Error 1, 5, 7)

4. Pursuant to CrR 8.3(b), a trial court may dismiss a prosecution in the interests of justice due to governmental misconduct that is prejudicial to the accused and materially affects his right to a fair trial. "Governmental misconduct" may be simple mismanagement. Based on its finding the pre-accusatorial delay actually prejudiced Mr. Oppelt and was due to the State's negligence, did the trial court abuse its discretion in concluding Mr.

Oppelt did not prove by a preponderance of evidence that he could not receive a fair trial? (Assignments of Error 4, 6, 7)

5. A condition of community custody that prohibits possession of or access to pornographic material is unconstitutionally vague and may be challenged for the first time on direct appeal. Did the trial court err in prohibiting Mr. Oppelt from possessing or accessing pornographic material as a condition of community custody? (Assignment of Error 8)

6. A court can impose conditions of community custody only as authorized by the Sentencing Reform Act (SRA). The SRA does not authorize a court, as a condition of community custody, to prohibit an offender from possession pornography and drug paraphernalia, and from associating with known drug users or sellers, or to order an offender to stay out of drug areas, in the absence of evidence the conditions were directly related to the circumstances of the crime. Did the trial court act without authority when it imposed the aforementioned conditions of community custody in the absence of evidence the conditions were related to his offense? (Assignments of Error 8, 9, 10, 11)

C. STATEMENT OF THE CASE

On May 18, 2001, Everett Police Detective Jonathan Jensen was assigned to investigate allegations that David A. Oppelt, Jr., appellant herein, sexually assaulted his step-daughter, A.R. (DOB 3/4/1993). 6/12/08 RP 29-31.[1] He interviewed and obtained statements from Mr. Oppelt, A.R.'s mother, A.R.'s great-grandmother, and a neighbor. 6/12/08 RP 32-33. In addition, Detective Jensen and the responding officer prepared written reports. 6/12/08 RP 35, 42. The investigation was completed on August 2, 2001, at which time Detective Jensen referred the case to the Snohomish County Prosecutor's Office. 6/12/08 RP 33, 42-43.

Almost six years later, on June 4, 2007, a Child Protective Service case worker contacted the Snohomish County Prosecutor's Office to inquire about the case. CP 92. The Snohomish County Prosecutor's Office had no record of the case but was able to obtain a copy of Detective Jensen's referral. CP 93.

Five and one-half months later, on November 26, 2007, the Snohomish County Prosecutor's Office filed an information that

[1]The Verbatim Report of Proceedings consists of eight volumes and will be referred by by date, followed by "RP" and the page number.

charged appellant David A. Oppelt, Jr. with one count of child molestation in the first degree, contrary to RCW 9A.44.083, alleged to have occurred "on or about the 4th day of May, 2001 through the 16th day of May, 2001," six and one-half years earlier. CP 187-88.

After yet another five months, on April 18, 2008, the prosecutor filed an amended information that added a charge of rape of a child in the first degree, contrary to RCW 9A.44.073, alleged to have occurred during the same time period in 2001. CP 183-84.

Mr. Oppelt moved to dismiss the prosecution for pre-accusatorial delay, pursuant to the due process clause and CrR 8.3(b). CP 164-80; 6/5/08 RP 2-39. Mr. Oppelt argued the delay was actually prejudicial to his ability to mount a defense because A.R.'s great-grandmother, Bertha Olson, to whom A.R. allegedly first reported the sexual abuse, had developed hypothyroidism, a medical condition that affected her memory. 6/5/08 RP 7-9. By the time of the trial, Ms. Olson remembered only A.R.'s allegations and that either she or A.R. applied an unknown lotion to A.R.'s genital area one day prior to the trip to the hospital. 6/5/08 RP 6-8. Mr. Oppelt further argued he was prejudiced by the loss of Detective

Jensen's field notes and the inability to interview A.R. at the time of the initial report. 6/5/08 RP 10-12.

The State conceded negligence and acknowledged, "And obviously, we don't have a reason." 6/5/08 RP 4, 26.

The trial court concluded Mr. Oppelt was actually prejudiced by Ms. Olson's loss of memory but was only speculatively prejudiced by the loss of the detective's field notes and the inability to interview A.R. at the time of her report. CP 94-95; 6/5/08 RP 34-35. The court also concluded the pre-accusatorial delay from August 2001 until June 2007 was negligently caused by the case "slipping through the cracks." CP 95; 6/5/08 RP 35-36. The court then concluded that, although "the balancing test is somewhat of a close one," the State's interest in pursuing the prosecution outweighed the actual prejudice to Mr. Oppelt on the grounds the passage of time was equally prejudicial to the State and Mr. Oppelt could still receive a fair trial. CP 95; 6/5/08 RP 36-39.

The case proceeded to trial before a jury. A.R. testified Mr. Oppelt inappropriately touched her on two occasions. On the first occasion, after A.R. spent the night sleeping in the same bed as her mother and Mr. Oppelt, she awoke to Mr. Oppelt pulling down her shorts and underpants and rubbing the area around her vaginal

opening. 4/10/08 RP 91-93. She pretended to be asleep and the rubbing continued until a family friend came into the bedroom. 4/10/08 RP 92-95. The next day, on the second occasion, A.R. was wrapped in a blanket and napping on the living room couch when Mr. Oppelt again pulled down her clothes and rubbed near her vaginal opening. 4/10/08 RP 97-98, 100-01. She reported the incidents to her great-grandmother who told her to apply lotion to her genital area. 6/10/08 RP 105.

Bertha Olson testified that A.R. said her "pee-pee" was sore. 6/11/08 RP 51. Ms. Olson told A.R. to put some lotion on the area. 4/11/08 RP 51. According to Ms. Olson, she asked about the soreness and A.R. stated that Mr. Oppelt had "touched her privates with his hand and put his finger in it." 4/11/08 RP 52. Ms. Olson then called Denise Oppelt to report the accusation. 4/11/08 RP 57. Ms. Olson further testified she had developed hypothyroidism since the incident, a medical condition that affected her memory, such as she could not remember the type of lotion applied to A.R.'s genitals, she was not certain whether her husband, Floyd Olson, was living with her at the time of the allegations, and she did not remember speaking with the police about the incident. 6/11/08 RP 61-64, 80, 101-02.

Bonnie Bortles, a family friend, testified she went to the Oppelt's home on May 14, 2001, to deliver some legal papers. 6/11/08 RP 107, 111-12. She entered Mr. Oppelt's bedroom where she saw Mr. Oppelt on one side of the bed and A.R. under the covers on the other side of the bed, apparently asleep. 6/11/08 RP 114-16. Mr. Oppelt did not appear startled or nervous, he did not have an erection, and he did not try to conceal A.R. 6/11/08 RP 126, 133.

Detective Jensen testified he had very little memory of the investigation independent from his report. 6/12/08 RP 46. A forensic nurse, a sexual assault nurse examiner, and a child interviewer, all of whom testified on behalf of the State, had no independent memory of the incident and testified exclusively from their reports generated in 2001. 6/10/08 RP 65; 6/11/08 RP 150, 200.

The jury found Mr. Oppelt guilty of child molestation in the first degree and not guilty of rape of a child in the first degree. CP 65-66. At sentencing, the court imposed a standard range sentence. CP 28. The court also imposed various conditions of community custody, including a prohibition from possessing or accessing pornographic materials and drug paraphernalia,

associating with known users or sellers of illegal drugs, and from entering drug areas as defined by a community corrections officer. CP 31-32.

This appeal timely followed. CP 5-21.

D. ARGUMENT

1. PRE-ACCUSATORIAL DELAY VIOLATED MR. OPPELT'S CONSTITUTIONAL RIGHT TO DUE PROCESS.

a. A criminal defendant's constitutional right to due process is violated by a prejudicial, unjustified pre-accusatorial delay in filing charges. A pre-accusatorial delay in filing charges may violate the Due Process Clause of the Fifth Amendment to the United States Constitution. *United States v. Lovasco*, 431 U.S. 783, 789, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977); *State v. Norby*, 122 Wn.2d 258, 262-63, 858 P.2d 210 (1993). A delay may violate due process even if charges are brought within the statute of limitations.

> Statutes of limitations specify the limit beyond which there is an irrebuttable presumption that the defendant's right to a fair trial is prejudiced. However, while statutes of limitations continue as the primary guaranty against bringing stale charges, they do not preclude courts from raising a rebuttable presumption of prejudice where as here there is a prearrest delay short of the period set by the statute of limitations. Nor do statutes of limitations excuse unreasonable

> delay or failure to prosecute at an earlier time. Indeed, statutes of limitations do not preclude judicial inquiry into the reasonableness or constitutionality of delays within that period. This conclusion is supported by the court's ability to review prearrest delays to determine whether a defendant's due process rights have been violated.

State v. Chavez, 111 Wn.2d 548, 560, 761 P.2d 607 (1988).

Following *Lovasco*, the Washington Supreme Court established a three-step test for determining whether a delay violated a defendant's due process rights: "(1) the defendant must show he was prejudiced by the delay; (2) the court must consider the reasons for the delay; and (3) if the State is able to justify the delay, the court must undertake a further balancing of the State's interest and the prejudice to the accused." *State v. Lidge*, 111 Wn.2d 845, 848, 765 P.2d 1292 (1989), *quoting State v. Alvin,* 109 Wn.2d 602, 604, 746 P.2d 807 (1987).

The three steps are considered sequentially, that is, a defendant must first establish prejudice, then the court will consider the State's reasons for the delay, and finally, if the delay is justified, the court will balance the State's interest against the prejudice to the defendant. *Norby*, 122 Wn.2d at 264; *State v. Calderon*, 102 Wn.2d 348, 353, 684 P.2d 1293 (1984); *State v. Dixon*, 114 Wn.2d 857, 860, 792 P.2d 137 (1990). The third step is not reached if

either the defendant cannot demonstrate actual prejudice or the State cannot justify the delay. *State v. Warner*, 125 Wn.2d 876, 883, 889 P.2d 479 (1995); *State v. Frazier*, 82 Wn. App. 576, 592, 918 P.2d 964 (1996); *State v. Anderson*, 46 Wn. App. 565, 568-69, 731 P.2d 519 (1986). When balancing the competing interests of the parties, the ultimate question is "whether the action complained of ... violates those 'fundamental conceptions of justce which lie at the base of our civil and political institutions' ... and which define 'the community's sense of fair play and decency.'" *Lovasco*, 431 U.S. at 790 (internal citations omitted); *accord Dixon*, 114 Wn.2d at 860; *Calderon*, 102 Wn.2d at 353.

A trial court's ruling on a motion to dismiss for a due process violation is reviewed *de novo*. *Warner*, 125 Wn.2d at 883.

b. The pre-accusatorial delay of six years and eleven months was prejudicial to Mr. Oppelt and unjustified by the State, requiring vacation of the conviction. The trial court found Mr. Oppelt was actually prejudiced by the delay and the delay was caused by the State's negligence when the case "slipped through the cracks." 6/5/08 RP 34-36; CP 53-55. Therefore, the trial court erred in reaching the third step and balancing the interests of the parties. *See Frazier*, 82 Wn. App. at 592 ("The third step,

balancing the State's interest against the prejudice to the accused, is undertaken only when a justification is presented.").

Even if the court properly reached the third step, it erred in concluding the prejudice to Mr. Oppelt was outweighed by the State's interests. "The State has no interest in processing the accused in an unjustifiably negligent fashion." *Frazier*, 82 Wn. App. at 592. Because the pre-accusatorial delay here was unjustifiably negligent, the State had no legitimate interest in pursuing the prosecution.

Moreover, the court improperly considered whether the delay was prejudicial to the State:

> In this case the court finds that the State's interests outweigh the prejudice shown to the defendant for the following reasons: *the loss of Bertha Olson's memory, the issue with the lotion, and the delay in prosecution will likely weigh against the State's interests more than the defendant's interests*; the defense will still be able to argue that the lotion applied may have caused the redness on the victim's genitalia, the issue about Floyd can be reconciled by other witnesses, the loss of the field notes is unlikely to have actually prejudiced the defendant, *the State will have much more of a challenge in proving this case due to the passage of time.*

CP 55 (Conclusion of Law 6) (emphasis added).

> Based on the above, the defendant has not met his burden of proving that he cannot receive a fair trial. *The prejudice shown is just as likely to make it more*

> *difficult for the State to prove its case and is outweighed by the State's interest in prosecuting the defendant.*

CP 55 (Conclusion of Law 7) (emphasis added).

This is not the correct standard. First, the balancing process does not involve weighing the relative degree of prejudice of the parties. Rather, the issue of prejudice resides with the defendant only. As stated above, the balancing process involves weighing the prejudice to the defendant with the reasons for the delay. *See, e.g., Norby*, 122 Wn.2d at 263 and cases cited therein. Second, the court's conclusion of prejudice to the State is purely speculative. As this Court has stated, "[A] mere allegation that witnesses are unavailable or that memories have dimmed is insufficient" to establish prejudice. *State v. Gee*, 52 Wn. App. 357, 367, 760 P.2d 361 (1988).

Furthermore, the court's conclusion that the balance tipped in favor of the State's interest was unsupported by the record. The State's case relied heavily on statements and investigative notes prepared in 2001. By the time of trial, none of the parties who investigated the incident had an independent memory of the investigation. 6/10/08 RP 65; 6/11/08 RP 150, 200; 6/12/08 RP 46. Therefore, for all practical purposes, the witnesses were

unavailable for cross-examination on their notes and statements. Given the passage of time, the lack of any corroborating physical evidence, the complaining witness's reluctance to proceed, together with the absence of any similar accusations against Mr. Oppelt, the prejudice to Mr. Oppelt and his inability to mount a meaningful defense significantly outweighed the State's interest in pursuing a charge that was stale due to its own negligence.

A prejudicial, negligent, and unjustified pre-accusatorial delay violates due process and requires vacation of a conviction. *Warner*, 125 Wn.2d at 890; *Lidge*, 111 Wn.2d at 848. Mr. Oppelt's conviction for child molestation in the first degree must be vacated and the charge dismissed.

2. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR. OPPELT'S MOTION TO DISMISS FOR PRE-ACCUSATORIAL DELAY PURSUANT TO CrR 8.3(b).

A trial court may dismiss a criminal prosecution in the furtherance of justice, pursuant to CrR 8.3(b) that provides:

> The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

The Washington Supreme Court has stated, "[A] trial court may not dismiss charges under CrR 8.3(b) unless the defendant shows by a preponderance of the evidence (1) 'arbitrary action or governmental misconduct' and (2) 'prejudice affecting the defendant's right to a fair trial.'" *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003), *quoting State v. Michielli*, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1993).

A trial court's ruling regarding dismissal pursuant to CrR 8.3(b) is reviewed for abuse of discretion. *Michielli*, 132 Wn.2d at 240. A court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *State v. Dixon*, 159 Wn.2d 65, 75-76, 147 P.3d 491 (2006). A decision is based on untenable grounds or made for untenable reasons if it rests upon facts that are not supported in the record or it is reached by applying the incorrect legal standard. *Id.* at 76. A decision is manifestly unreasonable if the correct legal standard is applied to the facts but the decision is outside the range of reasonable choices. *Id.*; *Rohrich*, 149 Wn.2d at 654.

Mr. Oppelt established governmental misconduct by a preponderance of the evidence. Governmental misconduct may be

"simple prosecutorial mismanagement." *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993); *State v. Wilson*, 149 Wn.2d 1, 13, 65 P.3d 657 (2003) (Sanders, J., concurring). Here, again, the State acknowledged mismanagement by letting the case "slip through the cracks" for almost seven years without any justification. 6/5/08 RP 4, 26.

Mr. Oppelt also established prejudice affecting his right to a fair trial by a preponderance of the evidence. The trial court found he was actually prejudiced by pre-accusatorial delay. 6/5/08 RP 34-35; CP 54. Yet, the court then found Mr. Oppelt did not establish he could not receive a fair trial because the delay was "just as likely" to be prejudicial to the State. CP 55 (Conclusion of Law 6, 7). Again, this is not the correct standard. CrR 8.3(b) refers only to "prejudice to the rights of the accused." Therefore, any speculative prejudice to the State is irrelevant. The court's consideration of prejudice to the State was an application of the incorrect legal standard and, as such, was an abuse of discretion.

Based on the State's concession of mismanagement and the trial court's finding of actual prejudice to Mr. Oppelt, the trial court abused its discretion in denying his motion to dismiss pursuant to CrR 8.3(b).

3. THE CONDITION OF COMMUNITY CUSTODY PROHIBITING POSSESSION OF OR ACCESS TO PORNOGRAPHY WAS UNCONSTITUTIONALLY VAGUE.

The condition of community custody that prohibited Mr. Oppelt from possessing or accessing pornographic materials was unconstitutionally vague. Although there was no allegation that pornographic materials were related to the offense, Condition 7 provided, in pertinent part: "Do no possess or access pornographic materials, as directed by the supervising Community Corrections Officer." CP 31 (Judgment and Sentence, Appendix A).

This issue is controlled by *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008). In *Bahl*, the defendant was convicted of rape in the second degree and burglary in the first degree. 164 Wn.2d at 743. At sentencing, the court imposed, *inter alia*, a condition of community custody identical to the condition at issue here, prohibiting possession of or access to pornographic materials, in the absence that the defendant had ever even viewed such material. *Id.* Procedurally, the Washington Supreme Court ruled the issue could be raised for the first time on direct appeal and the merits of a pre-enforcement vagueness claim could be addressed in that it raised a purely legal question amendable to resolution on

the record. *Id.* at 744-47, 751. On the merits, the Court ruled the prohibition on possession of or access to pornographic materials was unconstitutionally vague, because the condition implicated the First Amendment, the term "pornography" was not defined, and the community corrections officer had complete discretion to determine what material fell within the condition. *Id.* at 752-58.

So, too, here, the vagueness challenge is a purely legal issue that can be resolved on the present record, the term "pornography" was not defined, and the community corrections officer had discretion to determine what materials fell within the prohibition. This matter must be remanded for resentencing and the unconstitutionally vague prohibition against possessing or accessing pornography must be stricken. *Id.* at 762; *State v. Jones*, 118 Wn. App. 199, 212, 76 P.3d 258 (2003).

4. THE DRUG-RELATED AND PORNOGRAPHY-RELATED CONDITIONS OF COMMUNITY CUSTODY WERE NOT JUSTIFIED BY THE FACTS UPON WHICH THE COURT COULD RELY.

a. The sentencing court can impose punishment only as authorized by statute. When an individual is convicted of a felony, the sentencing court must impose punishment as authorized by the SRA. RCW 9.94A.505(1); *In re Postsentence Review of*

Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007) (a court only has sentencing authority as provided by the Legislature). When sentencing an offender, the court may rely only upon facts that are admitted by a plea agreement or admitted, acknowledged, or proven at sentencing. Former RCW 9.94A.370(2) (current RCW 9.94A.530(2)).

RCW 9.94A.700(5)(e) authorizes imposition of "crime-related prohibitions," as a condition of community custody. A "crime-related prohibition" is statutorily defined as:

> an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

Former RCW 9.94A.030(12) (currently RCW 9.94A.030(13)).

A challenge to a sentence imposed without statutory authority, including the conditions of community placement or custody, may be raised for the first time on appeal. *State v. Jones*, 118 Wn. App. at 204. Sentencing conditions are reviewed for abuse of discretion. *State v. Armendariz*, 160 Wn.2d 106, 112, 156 P.3d 201 (2007). On review, the appellate court is to determine

whether the facts underlying the community custody conditions were supported by substantial evidence. *State v. Motter*, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007).

b. The court imposed conditions of community custody that were not justified by the facts upon which the court could rely. In Appendix A to the Judgment and Sentence, entitled "Additional Conditions of Community Custody," the trial court imposed numerous conditions, including:

> 7. Do not possess or access pornographic materials, as directed by the supervising Community Corrections Officer. Do not frequent establishments whose primary business pertains to sexually explicit or erotic material.
>
> 14. Do not associate with known users or sellers of illegal drugs.
>
> 15. Do not possess drug paraphernalia.
>
> 16. Stay out of drug areas, as defined in writing by the supervising Community Corrections Officer.l

CP 31-32.

The facts upon which the court could rely did not establish that pornography or illegal drugs were directly related to the circumstances of the offense. Also, at sentencing, the trial court did not make a determination that the above conditions were related to

the offense. In fact, neither pornography nor illegal drugs were mentioned whatsoever.

In *Jones*, the defendant challenged, *inter alia*, the community custody conditions which prohibited him from consuming alcohol and which ordered him to participate in alcohol counseling, in the absence of evidence alcohol contributed to his offense. 118 Wn. App. at 206-08. Interpreting former RCW 9.94A.120(8)(c) (current RCW 9.94A.505(8), .700, .710-.715), Division Two of this Court stated, "[T]he SRA ... has provided that a trial court, when imposing community custody for specified crimes ... may order an offender to "participate in crime-related treatment or counseling services." ... Accordingly, we hold that the trial court erred by ordering Jones to participate in alcohol counseling." Similarly, here, given the lack of evidence the conditions were directly related to the circumstances of Mr. Oppelt's offenses, the conditions were imposed without authority.

c. <u>This Court should strike the conditions that were not related to the offense</u>. Where a court imposes conditions of community placement which are unauthorized by the SRA, the remedy is to strike those conditions. *Jones*, 118 Wn. App. at 212. The facts upon which the court could rely did not establish

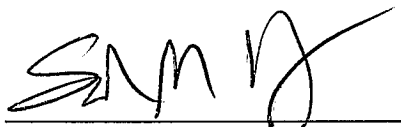
conditions 7, 14, 15, and 16 were crime-related. The unauthorized conditions of community custody must be stricken.

E. CONCLUSION

The prejudicial and unjustified pre-accusatorial delay violated Mr. Oppelts' constitutional right to due process and materially affected his right to a fair trial. Also, the trial court imposed conditions of community custody that unconstitutionally vague, not crime-related, and not justified by the facts upon which the court could rely. For the foregoing reasons, Mr. Oppelt respectfully requests this Court to reverse and dismiss his conviction for child molestation in the first degree due to pre-accusatorial delay. In the alternative, Mr. Oppelt requests this Court to strike the conditions of community custody that were unconstitutionally vague or that were not related to the offense.

DATED this 30th day of April 2009.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, DAVID OPPELT, JR., Appellant.	)	NO. 62074-6-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF APRIL, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE SNOHOMISH COUNTY PROSECUTING ATTORNEY 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON, THIS 30TH DAY OF APRIL, 2009.

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